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No. 88-402

Supreme Court, U.S.
FILED
NOV 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1988

THE STATE OF MICHIGAN, Petitioner

v.

EDWIN MEESE, Attorney General
for the United States, Respondent

and

STEVE ASMAR and METRO INSTITUTIONAL
FOOD SERVICES, INC.
Intervening Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

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STATEMENT OF QUESTIONS PRESENTED

I.

IS TITLE 18, U.S.C. § 2515 INAPPLICABLE TO THE STATES PURSUANT TO THE TENTH AMENDMENT, OR, IN THE ALTERNATIVE, DOES CONGRESS HAVE THE AUTHORITY TO BIND STATES UNDER THE "WIRETAP LAW" PURSUANT TO THE COMMERCE CLAUSE?

II.

IS SECTION 2515 OF TITLE III OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968 BINDING UPON THE STATES PURSUANT TO AMENDMENTS OTHER THAN THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

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BRIEF IN OPPOSITION TO PETITION FOR
A WRIT OF CERTIORARI TO THE SIXTH
CIRCUIT COURT OF APPEALS

The Intervening Respondents, STEVE ASMAR and METRO INSTITUTIONAL FOOD SERVICES, INC. respectfully request that this Court deny Petitioner's Petition for Writ of Certiorari to the Sixth Circuit Court of Appeals.

OPINIONS BELOW

The Opinion of the District Court for the Eastern District of Michigan is attached hereto as Appendix A. The opinion of the Sixth Circuit Court of Appeals is appended as Appendix B.

JURISDICTION

The judgment of the District Court for the Eastern District of Michigan was entered on August 10, 1987. The judgment of the Sixth Circuit Court of Appeals was entered on July 6, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides in relevant part:

"The Congress shall have Power

* * *

To regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

2. The Fourth Amendment to the United States Constitution provides in relevant part:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

3. The Fifth Amendment to the United States Constitution provides in relevant part:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

4. The Tenth Amendment to the United States Constitution provides in relevant part:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

5. The Fourteenth Amendment to the United States Constitution provides in relevant part:

"Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

6. Title 18, U.S.C. § 2510 provides in relevant part:

"As used in this chapter [18 USCS §§ 2510 et seq.]--

* * *

(2) 'oral communication' means any oral communication uttered by a person exhibiting an expectation that such

communication is not subject to interception under circumstances justifying such expectation;

(3) 'State' means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) 'intercept' means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

(5) 'electronic, mechanical, or other device' means any device or apparatus which can be used to intercept a wire or oral communication other than --

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) 'person' means any employee, or agent of the United states or any State or political subdivision thereof, and any

individual, partnership, association, joint stock company, trust, or corporation;

* * *

(8) 'contents,' when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

(9) 'Judge of competent jurisdiction' means --

(a) a judge of the a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;

* * *

(11) 'aggrieved person' means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed."

7. Title 18, U.S.C. § 2515 provides in relevant part:

"Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any

court, grand jury, department, officer agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter [18 USCS §§ 2510 et seq.]."

STATEMENT OF THE CASE

The State of Michigan is contesting the constitutionality of the Omnibus Crime Control and Safe Streets Act of 1968 based upon the Tenth Amendment. If the State of Michigan is correct then, of course, the purpose for Title 18 U.S.C. § 2510 et seq. would be thwarted and Congress' power to control commerce would be thwarted and be meaningless. Furthermore, the State ignores the constitutionality of Title 18, U.S.C. § 2510 et seq. as applicable to the states under the First, Fourth and Fifth Amendments of the United States Constitution as made applicable to them by the Fourteenth Amendment.

What transpired in this particular is that there was an illegal wiretapping made of conversations involving three individuals, none of whom had given authorization nor had known about such electronic recording of their conversations on a tape. The perpetrator of the

improper act then mailed the tape to an attorney. The attorney then proceeded to make use of this tape and disseminate the contents of the tape in an unauthorized manner including giving a copy to the Wayne County Prosecutor's office.

An attempt was made to have a grand jury investigation based upon the tape. The grand jury judge quashed the tape pursuant to Title 18, U.S.C. § 2510 et seq. The State of Michigan never appealed and attempted to come to this Court directly by a Petition for Writ of Certiorari for which the Petition was denied. Thereafter the State of Michigan commenced litigation in the United States District Court for the Eastern District of Michigan. Summary judgment was entered on the grounds that Title 18, U.S.C. § 2510 et seq. did not violate the Tenth Amendment of the U.S. Constitution and that Congress did have the power under the commerce clause to regulate illegal wiretapping, including the prohibition of the

use of any evidence derived therefrom in, among several areas, state courts (§ 2515). An appeal was made to the United States Court of Appeals, Sixth Circuit and that court sustained the dismissal, but for other reasons, including the fact that the State had not used their own procedural steps in appealing the dismissal through the state courts.

At this particular time what is at issue is whether the State of Michigan is immune from the provisions of Title 18, U.S.C. § 2515, that no evidence shall be received in any hearing in its courts when an electronic recording is tainted.

The Complaint was filed in the within matter by the State of Michigan on the grounds that Title III of the Omnibus Crime Control and Safe Streets Act of 1968, and more particularly § 2515 therein, is unconstitutional pursuant to the Tenth Amendment of the United States Constitution and therefore is not applicable or binding upon the states.

Intervening Appellees aver that the State of Michigan has failed to read the Senate Report set forth in the United States Code, Congressional and Administrative News, 90th Congress, Second Session, 1968, Vol. 2, Legislative History, which had clearly indicated that the basis of Title III is to protect the right of privacy and that it has nothing whatsoever to do with the Tenth Amendment.

Also, case law is cited in support of Intervening Appellees' position.

REASONS FOR DENYING THE WRIT

I.

TITLE 18, U.S.C. § 2515 IS INAPPLICABLE TO THE STATES PURSUANT TO THE TENTH AMENDMENT, OR, IN THE ALTERNATIVE, CONGRESS DOES HAVE THE AUTHORITY TO BIND STATES UNDER THE "WIRETAP LAW" PURSUANT TO THE COMMERCE CLAUSE.

The commerce clause of the United States Constitution, Art. I, § 8, Cl. 1 and 3 state as follows:

> "The Congress shall have Power
>
> * * *
>
> To regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

In Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc., 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981), this Court held that the Surface Mining Control and Reclamation Act was constitutional and did not violate the commerce clause or the Tenth Amendment of the United States Constitution. This Court held that if there is any rational basis for

such finding it must defer to congressional findings that regulate activities which affect interstate commerce. Further, the denomination of an activity as "local" or "intrastate" activity does not resolve the question of whether Congress may regulate it under the commerce clause, but commerce power extends to those activities intrastate which so affect interstate commerce, or exertion of power of Congress over it, as to make regulation of them appropriate means for attainment of legitimate end, the effective execution of the granted power to regulate interstate commerce. See United States Constitution, Art. I, § 8, Cl. 3, supra. In Hodel, supra, this Court held that in order for a state to succeed in its claim that the congressional commerce power legislation is invalid under the Tenth Amendment, the state must satisfy three requirements: (1) THERE MUST BE A SHOWING THAT THE CHALLENGED STATUTE REGULATES STATES AS STATES; (2) THAT

THE FEDERAL REGULATION MUST ADDRESS MATTERS THAT ARE INDISPUTABLY ATTRIBUTES OF STATE SOVEREIGNTY; AND (3) IT MUST BE APPARENT THAT STATES' COMPLIANCE WITH FEDERAL LAW WOULD DIRECTLY IMPAIR THEIR ABILITY TO STRUCTURE INTEGRAL OPERATIONS IN AREAS OF TRADITIONAL FUNCTIONS.

This Court further held in Hodel, supra, that the Tenth Amendment did not limit congressional power to preempt or displace state regulation of private activities affecting interstate commerce. Congress does not invade areas reserved to the states by the Tenth Amendment simply because it exercises its authority under the commerce clause in a manner that displaces the states' exercise of their police powers.

In the case at bar, there is no question that recording of phone conversations off of the telephone involves interstate commerce. See Duncan v. United States, 48 F.2d 128

(D.C. Ore. 1931) where the court stated, among other things, that the transmission of ideas by telephone or telegraph is regulated by Congress pursuant to the commerce clause, citing Pensacola T. Co. v. W.U., 96 U.S. 1, 24 L.Ed. 708 and Western Union Teleg. Co. v. Pendleton, 122 U.S. 347, 7 S.Ct. 1126, 30 L.Ed. 1187. In Duncan, supra, it was held that in regulating interstate commerce Congress may exercise police power which, in the absence of such delegation to the federal government, would be exclusively within the police power of the state. The determinative point is whether or not the Constitution does delegate to the United States police power which, in the absence of such delegation, could only be exercised by the states. The Duncan court further discussed the power of Congress under the constitutional grant to regulate commerce between the states pursuant to U.S. Const., Art. I, § 8, cl. 7 such as the Mann Act, violation of the child labor laws,

and the violation of the mail fraud statute, etc. The Duncan court further held that the power of Congress to regulate interstate commerce could only be accomplished by prohibiting those acts which could only be effectuated by the evil intended.

The Duncan court cited Clark v. U.S., (C.C.A.), 211 F. 916 wherein the Federal Criminal Code of 1909 was sustained as a constitutional exercise of the power of Congress to regulate interstate commerce.

In United States v. Darby, 312 U.S. 100, 312 U.S. 657, 81 S.Ct. 451, 85 L.Ed. 609 (1941) it was held that Congress' power under the interstate commerce clause was the power to prescribe the rule by which commerce is to be governed, and it extends to those regulations which aid, foster and protect the commerce, and further embraces those which prohibit it. The power of Congress over interstate commerce is complete in itself, may be exercised to its utmost extent, and

acknowledges no limitations other than are prescribed by the Constitution, and that power can neither be enlarged nor diminished by the exercise or nonexercise of state power, citing U.S. Const., Art. I, § 8, cl. 3. In Darby, supra, this Court held that Congress, following its own conception of public policy concerning restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined may conceived to be injurious to the public health, morals or welfare even though the state has not sought to regulate their use, and such regulation is not a forbidden invasion of state power merely because either its motive or its consequence is to restrict the use of the articles of commerce within the states of destination and is not prohibited unless by other constitutional provisions. It was further held in Darby, supra, that there was no objection to the assertion by Congress of the power to

regulate interstate commerce in that its exercise is attended by the same incidents which attend the exercise of the police power of the states. The purpose of regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. Whatever Congress' motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the commerce clause.

If the State of Michigan is correct, then, of course, Congress would not have the power to restrict illegal wiretapping of phone conversations or air transmittal of many types of communications, whether it be voice or whether it be by electronic means. Such communications could be intercepted and used for any purpose.

A further clarification of the power of Congress to regulate interstate commerce, prohibit the use and dissemination of illegal wiretaps and prohibit the use of evidence in any hearing, etc. pursuant to Title 18, U.S.C. § 2515 is set forth in Hunter v. Underwood, 471 U.S. 222, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985). It was held in Hunter that the Tenth Amendment cannot save legislation prohibited by the subsequently enacted Fourteenth Amendment. In the case at bar, the State of Michigan has failed to recognize that the First, Fourth and Fifth Amendments are made applicable to the states by the Fourteenth Amendment.

In United States v. Von Stephens, 774 F.2d 1411 (C.A. 9 1985) it was held that the application of the federal theft statute to defendant's unlawful receipt and cashing of warrants did not violate the state's rights under the Tenth Amendment. This was a valid exercise of congressional power under the

constitutional section allowing Congress to provide for the general welfare, and does not violate a state's rights under the Tenth Amendment, citing U.S. Const., Art. I, § 8, cl. 1. In Von Stephens, supra, the court held that the Tenth Amendment provides that the powers that are not delegated to the United States by the Constitution are reserved to the states. Art. I, § 8, cl. 1 allows Congress to provide for the general welfare of the United States which includes preventing of illegal wiretaps, as well as Art. I, § 8, cl. 3 granting Congress plenary power to regulate commerce among the states.

In United Transportation Union v. Long Island Railroad Company, 455 U.S. 678, 102 S.Ct. 1349, 71 L.Ed.2d 547 (1982), it was held that the Tenth Amendment did not prohibit application of the Railway Labor Act to a state-owned railroad engaged in interstate commerce since operation of the railroad was clearly not an integral part of traditional state

activities generally immune from federal regulations.

Furthermore, in Scarborough v. United States, 431 U.S. 563, 97 S.Ct. 1963, 52 L.Ed.2d 582 (1977) this Court discussed the constitutionality of a particular provision which was in violation of Title 7 of the Omnibus Crime Control and Safe Streets Act of 1968, being Title 18, U.S.C. §§ 1201-1203. One of the petitioner's defense was that merely possessing a firearm was not a nexus "between the states" so that the court lacked jurisdiction over him and he should not have been tried and convicted. The trial court held that it was not necessary that the government prove that the defendant purchased the gun in some state other than that where he was found with it or that he carried it across state line, nor must the government prove who did purchase the gun. All that had to be demonstrated was that the firearm possessed by a convicted felon had previously traveled in

interstate commerce. The Scarborough court then held that the theories raised by the defendant could create serious loop holes in the congressional plan to "make it unlawful for a firearm . . . to be in the possession of a convicted felon," citing 114 Cong. Rec. 14773 (1968).

Like Scarborough, in this particular instance, if the State of Michigan is correct, then illegal wiretapping can run rampant because the federal government has no control over interstate commerce of telephone lines, telegraph lines and the like. Furthermore, one the hidden dangers which the grand jury judge in Wayne County recognized was that this would encourage, rather than prevent or deter, police to have illegal wiretappings made, mail the tape anonymously to themselves, and then use the same in court as evidence against the participants in such phone conversations; whereas, Title 18, U.S.C. § 2510 et seq. has built-in safeguards for warrants being issued

for legal wiretaps. The State of Michigan's proposition would allow state officers to run amuck, among other things, and encourage other violations by private citizens. See People v. Warner, 401 Mich. 186, 258 N.W.2d 385 (1977) where the State of Michigan itself recognized the constitutionality of Title 18, U.S.C. § 2510 et seq.

The attorney general of Michigan has failed to differentiate between the constitutionality of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 as to the states versus the interpretation and the application of Title 18, U.S.C. § 2510 et seq. to particular instances. It appears that what the Michigan attorney general was attempting to do was have the United States District Court act as an appellate court to the State of Michigan, Circuit Court for the County of Wayne, Grand Jury Judge, as to that judge's interpretation and applicability of the wiretap law in a particular instance that was heard before him.

II.

SECTION 2515 OF TITLE III OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968 IS BINDING UPON THE STATES PURSUANT TO AMENDMENTS OTHER THAN THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In the United States Code, Congressional and Administrative News, 90th Congress, Second Session, 1968, Vol. 2, Legislative History, p.2113, the purpose of the Omnibus Crime Control and Safe Streets Act of 1968 has been set forth as follows:

> "Title III prohibits all wiretapping and electronic surveillance by persons * * * . This proposed legislation conforms to the constitutional standards set out in Berger v. New York [87 S.Ct. 1873, 388 U.S. 41 (1967)], and Katz v. United States [88 S.Ct. 507, 389 U.S. 347 (1967)]."

Furthermore, the Senate Report at pp. 2153-54 states:

> "Title III is essentially a combination of S. 675, the Federal Wire Interception Act, introduced by Senator McClellan on January 25, 1967, and S. 2050, the Electronic Surveillance Control Act of 1967, introduced by Senator Hruska on June 29, 1967. Subsequent to the introduction of S. 675, the U.S. Supreme Court, on June 12, 1967, handed down the decision in

Berger v. New York, 87 S.Ct. 1873, 388 U.S. 41, which declared unconstitutional the New York State statute authorizing electronic eavesdropping (bugging) by law-enforcement officers in investigating certain types of crimes. The Court held that the New York statute, on its face, failed to meet certain constitutional standards. In the course of the opinion, the Court delineated the constitutional criteria that electronic surveillance legislation should contain. Title III was drafted to meet these standards and to conform with Katz v. United States, 88 S.Ct. 507, 389 U.S. 347 (1967).

Title III has as its dual purpose (1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized. To assure the privacy of oral and wire communications, title III prohibits all wiretapping and electronic surveillance by persons other than duly authorized law enforcement officers engaged in the investigation or prevention of specified types of serious crimes, and only after authorization of a court order obtained after a showing and finding of probable cause. The only exceptions to the above prohibition are: (1) the power of the President to obtain information by such means as he may deem necessary to protect the National from attack or hostile acts of a foreign power, to obtain intelligence information essential to the Nation's security, and to protect the internal security of the United States from those who advocate its overthrow by force or other unlawful means; (2) employees of the Federal Communications Commission

may, in the normal course of employment, intercept and disclose wire communications in the discharge of the monitoring responsibilities discharged by the Commission in the enforcement of chapter 5 of title 47 of the United States Code; and (3) employees of a communication common carrier may intercept and disclose wire communications in the normal course of their employment while engaged in any activity necessary to the rendition of service, or protection of the rights or property of the carrier of such communication."

The Senate Report further noted at p. 2154:

"The first case in which the Supreme Court considered the status of wiretapping was Olmstead v. United States, decided in 1928, 48 S.Ct. 564, 277 U.S. 438. It held that the tapping of telephone wires and the use of the intercepted messages did not constitute an unreasonable search and seizure under the Fourth Amendment, there being no trespass into constitutionally protected areas and no seizure of anything tangible.

* * *

Soon after the enactment of the Federal Communications Act, the Supreme Court held in Nardone v. United States, 58 S.Ct. 275, 302 U.S. 379 (1937), that evidence obtained by wiretapping in violation of section 605 was inadmissible in Federal courts. The decision was based not on constitutional grounds, but rather on the Court's supervisory powers over Federal courts and officers."

At p. 2155 the Senate Report states as follows:

> "Thus the Supreme Court has effectively prevented the use in both Federal and State courts of intercepted communications by wiretapping, as well as the fruits thereof. State officers would be subject to Federal prosecution and, therefore, most State prosecutors do not use such evidence, although it is authorized by their State statutes."

At p. 2157 the Senate Report defined the purpose of Title III as follows:

> "The major purpose of title III is to combat organized crime."

At p. 2159 the Senate Report states as follows:

> "The principal argument of those who oppose wiretapping and electronic surveillance by law enforcement officers on court order is that it will destroy our right of privacy."

In further discussing Title III, the Senate Report states as follows at p.2161:

> "Organized criminals must hold meetings to play plans. Where the geographical area over which they operate is large, they must use telephones. Wiretapping and electronic surveillance techniques can intercept these wire and oral communications.
>
> * * *
>
> Debate over the constitutionality of wiretapping and electronic surveillance

techniques has raged insistently since the Court decided in 1928 in Olmstead v. United States, 48 S.Ct. 564, 277 U.S. 438 (1928), that wiretapping accomplished without a physical trespass into a constitutionally protected area did not violate any provision of the Constitution. That debate has taken many forms. It has posted many hypotheses. All of them need not now be considered, for the Court itself now has authoritatively set down the constitutional standards in this area on the use of these techniques in Berger v. New York, 87 S.Ct. 1873, 388 U.S. 411 (1967), and Katz v. United States, 88 S.Ct. 507, 389 U.S. 347 (1967).

The Berger decision reversed by a vote of 6 to 3 the conviction, secured through a court-ordered eavesdrop, of a New York public relations man for conspiracy to bribe the chairman of the New York State Liquor Authority. In declaring the New York eavesdropping statute unconstitutional, the Court held that (1) a conversation is within the fourth amendment's right to privacy protections, and the use of electronic devices to seize conversations is a search within the meaning of that amendment; (2) the language of the New York statute was so broad that it resulted in a trespassory intrusion into a constitutionally protected area and is violative of the fourth and 14th amendments; and (3) evidence obtained by an eavesdrop which violates the fourth amendment must be excluded in State courts."

The Senate Report further held on p.2162 as follows:

> "On certiorari the Supreme Court held that the Government's activities in electronically listening to and recording petitioner's words constituted an unlawful search and seizure within the fourth amendment and reversed the conviction.
>
> * * *
>
> In concluding, the Court held that the Government agents ignored the procedure of antecedent justification that is central to the fourth amendment, and a procedure the Court held to be a constitutional pre-condition of the kind of electronic surveillance involved in this case.
>
> Working from the hypothesis that any wiretapping and electronic surveillance legislation should include the above constitutional standards, the subcommittee has used the Berger and Katz decisions as a guide in drafting title III. Each section of title III is discussed in detail in the analysis section of this title, including those provisions which are intended to conform to the Berger and Katz decisions."

In discussing the importance of banning of the use of improperly obtained information from illegal wiretaps, the Senate Report held as follows:

> "Section 2515 of the new chapter imposes an evidentiary sanction to compel compliance with the other prohibitions of the chapter. It provides that intercepted wire or oral communications or evidence derived therefrom may not be received in

> evidence in any proceeding before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or a political subdivision of a State, where the disclosure of that information would be in violation of this chapter. The provision must, of course, be read in light of section 2518(10)(a) discussed below, which defines the class entitled to make a motion to suppress. It largely reflects existing law. It applies to suppress evidence directly. * * * AND IT IS NOT LIMITED TO CRIMINAL PROCEEDINGS. SUCH A SUPPRESSION RULE IS NECESSARY AND PROPER TO PROTECT PRIVACY." (Emphasis Added) (p. 2184-5).

IN MICHIGAN, WIRETAPPING OR ELECTRONIC EAVESDROPPING IS BARRED AS TO ALL, BOTH THE PUBLIC AUTHORITIES AS WELL AS PRIVATE PERSONS. [See M.C.L. § 750.539(a) et seq.]

The Senate Report clearly indicates at p. 2189 the importance of Section 2518 of Title III as follows:

> "Section 2518 of the new chapter sets out in detail the procedure to be followed in the interception of wire or oral communications.
>
> * * *
>
> Subparagraph (a) requires the identity of the person who makes, and the person

> who authorized the application to be set out. This fixes responsibility.
>
> * * *
>
> Each of these requirements reflects the constitutional command of particularization [Berger v. New York, 87 S.Ct. 1873, 388 U.S. 41, 58-60 (1967); Katz v. United States, 88 S.Ct. 507, 389 U.S. 347, 354-56 (1967)]."

In the case of Berger v. New York, 87 S.Ct. 1873, 388 U.S. 41, 18 L.Ed.2d 1040 (1967) the Court held that a conversation is within the Fourth Amendment's protections and use of electronic devices to capture it is a "search" within the meaning of the U.S.C.A. Const. Amend. 4. The Court further held that the Fourth Amendment's right of privacy is enforceable against states through due process clause of the Fourteenth Amendment.

In Berger, supra, Justice Clark delivered the opinion on behalf of the Court in discussing the eavesdropping statute of New York as follows:

> "We have concluded that the language of New York's statute is too broad in its sweep resulting in a trespassory intrusion

> into a constitutionally protected area and is, therefore, violative of the Fourth and Fourteenth Amendments. This disposition obviates the necessity for any discussion of the other points raised."

In Berger, supra, the Supreme Court discussed the development of bugging and wiretapping and then discussed the first wiretap case of Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928) and the scientific development of electronic devices used for bugging and wiretapping from that day forward and also the exclusionary rule of evidence along with the Fourth Amendment's protections. The Berger Court further held as follows:

> "It is now well settled that 'the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643, 655, 81 S.Ct. 1684, 1691, 6 L.Ed.2d 1081 (1961). 'The security of one's privacy against arbitrary intrusion by the police--which is at the core of the Fourth Amendment--is basic to a free society.' Wolf v. People of the State of Colorado, 338 U.S. 25, 27, 69 S.Ct. 1359, 1361, 93 L.Ed. 1782 (1949). And its 'fundamental protections * * * are guaranteed * * * against invasion by the

States.' Sanford v. State of Texas, 379 U.S. 476, 481, 85 S.Ct. 506, 509, 13 L.Ed.2d 431 (1965). This right has most recently received enunciation in Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930. 'The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.' At 528, 87 S.Ct. at 1730. Likewise the Court has decided that while the 'standards of reasonableness' required under the Fourth Amendment are the same under the Fourteenth, they 'are not susceptible of Procrustean application * * *.' Ker v. State of California, 374 U.S. 23, 33, 83 S.Ct. 1623, 1630, 10 L.Ed.2d 726 (1963). We said there that 'the reasonableness of a search is * * * (to be determined) by the trail court from the facts and circumstances of the case and in light of the "fundamental criteria" laid down by the Fourth Amendment and in opinions of this Court applying that Amendment.' Ibid."

Furthermore, in Berger the Court held as follows:

"In any event we cannot forgive the requirements of the Fourth Amendment in the name of law enforcement. This is no formality that we require today but a fundamental rule that has long been recognized as basic to the privacy of every home in America. While'[t]he requirements of the Fourth Amendment are not inflexible, or obtusely unyielding to the legitimate needs of law enforcement.' Lopez v. United States, supra, at 464, 83 S.Ct. at 1404 (dissenting opinion

of Brennan, J.), it is not asking too much that officers be required to comply with the basic command of the Fourth Amendment before the innermost secrets of one's home or office are invaded. Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices. Some may claim that without the use of such devices crime detection in certain areas may suffer some delays since eavesdropping is quicker, easier, and more certain. However, techniques and practices may well be developed that will operate just as speedily and certainly and--what is more important--without attending illegality.

It is said that neither a warrant nor a statute authorizing eavesdropping can be drawn so as to meet the Fourth Amendment's requirements. If that be true then the 'fruits' of eavesdropping devices are barred under the Amendment. On the other hand this Court has in the past, under specific conditions and circumstances, sustained the use of eavesdropping devices. See Goldman v. United States, 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322; On Lee v. United States, 343 U.S. 747, 72 S.Ct. 967, 96 L.Ed. 1270; Lopez v. United States, supra; and Osborn v. United States, supra. In the latter case the eavesdropping device was permitted where the 'commission of a specific offense' was charged, its use was 'under the most precise and discriminate circumstances' and the effective administration of justice in a federal court was at stake. The States are under no greater restrictions. The Fourth Amendment does not make the 'precincts of the home or the office * * * sanctuaries where the law can never reach,' Douglas, J., dissenting

> in Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 321, 87 S.Ct. 1642, 1657, 18 L.Ed.2d 782, but it does prescribe a constitutional standard that must be met before official invasion is permissible. Our concern with the statute here is whether its language permits a trespassory invasion of the home or office, by general warrant, contrary to the command of the Fourth Amendment. As it is written, we believe that it does."

In Payton v. New York and Riddick v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), the Supreme Court held that Fourth Amendment to the United States Constitution is made applicable to states by the Fourteenth Amendment.

In Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), it was held that the government's activities in electronically listening to and recording defendant's words spoken into a telephone receiver in a public telephone booth violated the privacy upon which the defendant justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the Fourth Amendment, and the

fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth could have no constitutional significance. Furthermore, the Fifth Amendment, to some extent, reflects the Constitution's concern for the right of each individual to a private enclave where he may lead a private life. Under the Fourth Amendment, the protection of a person's general right to privacy, this is, his right to be let alone by other people, is, like the protection of his property and of his very life, left largely to the law of the individual states. The First Amendment imposes limitations upon governmental abridgment of freedom to associate and privacy in one's associations. Searches conducted outside the judicial process without prior approval by a judge or a magistrate, are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well delineated exceptions. What a person seeks to preserve

as private, even in an area accessible to the public, may be constitutionally protected under the Fourth Amendment. Footnote 5 holds:

> "The First Amendment, for example, imposes limitations upon governmental abridgment of 'freedom to associate and privacy in one's associations.'"

Further under Footnote 5, it is held:

> "To some extent, the Fifth Amendment too "reflects the Constitution's concern for * * * '* * * the right of each individual 'to a private enclave where he may lead a private life.'" Tehan v United States ex rel. Shott, 382 U.S. 406, 416, 86 S.Ct. 459, 465, 15 L.Ed.2d 453. Virtually every governmental action interferes with personal privacy to some degree. The question in each case is whether that interference violates a command of the United States Constitution."

The Court further held:

> "* * * For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. See Lewis v. United States, 385 U.S. 206, 210, 87 S.Ct. 424, 427, 17 L.Ed.2d 312; United States v. Lee, 274 U.S. 559, 563, 47 S.Ct. 746, 748, 71 L.Ed. 1202. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. See Rios v. United States, 364 U.S. 253, 80 S.Ct. 1431, 4 L.Ed.2d 1688; Ex parte Jackson, 96 U.S. 727, 733, 24 L.Ed. 877."

The Court continued:

> "He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office,[10] in a friend's apartment,[11] or in a taxicab,[12] a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication." (Footnotes omitted).

The Court further stated:

> "Thus, although a closely divided Court supposed in Olmstead that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested. Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements overheard without any 'technical trespass under * * * local property law.' Silverman v. United States, 365 U.S. 505, 511, 81 S.Ct. 679, 682, 5 L.Ed.2d 734. Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people--and not simply 'areas'--against unreasonable searches and seizures it becomes clear that the reach of that Amendment cannot

turn upon the presence or absence of a physical intrusion into any given enclosure.

We conclude that the underpinnings of Olmstead and Goldman have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance."

In Gelbard v. United States, 408 U.S. 41, 48, 92 S.Ct. 2357, 33 L.Ed.2d 179 (1972), at page 46 the Court held as follows:

"In Title III, Congress enacted a comprehensive scheme for the regulation of wiretapping and electronic surveillance. See United States v. United States District Court, 407 U.S. 297, 301-306. Title III authorizes the interception of private wire and oral communications, but only when law enforcement officials are investigating specified serious crimes and receive prior judicial approval, an approval that may not be given except upon compliance with stronger conditions. 18 U.S.C. §§2516, 2518(1)-(8). If a wire or oral communication is intercepted in accordance with the provisions of Title III, the contents of the communication

> may be disclosed and used under certain circumstances. 18 U.S.C. §2517. Except as expressly authorized in Title III, however, all interceptions of wire and oral communications are flatly prohibited. Unauthorized interceptions and the disclosure or use of information obtained through unauthorized interceptions are crimes, 18 U.S.C. §2511(1), and the victim of such interception, disclosure, or use is entitled to recover civil damages, 18 U.S.C. §2520. Title III also bars the use as evidence before official bodies of the contents and fruits of illegal interceptions, 18 U.S.C. §2515, and provides procedures for moving to suppress such evidence in various proceedings, 18 U.S.C. §2518(9)-(10)."

Furthermore, the Court in Gelbard, supra, held as follows:

> "The unequivocal language of §2515 expresses the fundamental policy adopted by Congress on the subject of wiretapping and electronic surveillance. As the congressional findings for Title III make plain, that policy is strictly to limit the employment of those techniques of acquiring information:
>
> > 'To safeguard the privacy of innocent persons, the interception of wire or oral communications where none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should

> further be limited to certain major types of offenses and specific categories of crime with assurances that the interception is justified and that the information obtained thereby will not be misused.' §801(d), 82 Stat. 211.'

The Senate committee report that accompanied Title III underscores the congressional policy:

* * *

Hence, although Title III authorizes invasions of individual privacy under certain circumstances, the protection of privacy was an overriding congressional concern.[7] Indeed, the congressional findings articulate clearly the intent to utilize the evidentiary prohibition of §2515 to enforce the limitations imposed by Title III upon wiretapping and electronic surveillance:

* * *

And the Senate report, like the congressional findings, specifically addressed itself to the enforcement, by means of §2515, of the limitations upon invasions of individual privacy:

* * *

Section 2515 is thus central to the legislative scheme. Its importance as a protection for 'the victim of an unlawful invasion of privacy' could not be more clear.[9] The purposes of §2515 and Title III as a whole would be subverted were the plain command of §2515 ignored when the victim of an illegal interception is

called as a witness before a grand jury and asked questions based upon that interception. Moreover, §2515 serves not only to protect the privacy of communications,[10] but also to ensure that the courts do not become partners to illegal conduct: the evidentiary prohibition was enacted also 'to protect the integrity of court and administrative proceedings.' Consequently, to order a grand jury witness, on pain of imprisonment, to disclose evidence that §2515 bars in unequivocal terms is both to thwart the congressional objective of protecting individual privacy by excluding such evidence and to entangle the courts in the illegal acts of Government agents." (Emphasis Added) (pp. 47-51)

RELIEF REQUESTED

WHEREFORE, Intervening Appellees move that the Appellants' request for relief be denied.

Respectfully submitted,

LAWRENCE J. STOCKLER & ASSOCIATES, P.C.

BY _____
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Dated: November 7, 1988

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE STATE OF MICHIGAN,

Plaintiff,

vs. Civ. No. 87-CV-70865-DT

EDWIN MEESE, ATTORNEY GENERAL FOR THE UNITED STATES,

Defendant,

and

STEVE ASMAR and METRO INSTITUTIONAL FOOD SERVICES, INC.,

Intervening Defendants.
_____/

AMENDED OPINION AND ORDER

I.

This is an action for a declaratory judgment. 28 U.S.C. § 2201; Fed. R. Civ. P. 57. Plaintiff, the State of Michigan, seeks a declaration that Title III of the Omnibus Crime Control Act and Safe Streets Act of 1968 ("the

Act"), 18 U.S.C. §§ 2510-2520,[1] violates the

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[1]The case focuses on section 2515, which provides in full:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury . . . of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Section 2511 provides in pertinent part:

> (1) Except as otherwise specifically provided in this chapter any person who -
> (a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavoer to intercept, any wire or oral communication;
>
> * * *
>
> (c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(Footnote Continued)

Tenth Amendment of the United States Constitution[2] as applied to the states. Section 2515 of Title 18 prohibits, inter alia, a state or political subdivision from introducing as evidence in any proceeding the contents, or fruits thereof, of a communication intercepted in violation of section 2511.

(Footnote Continued)

> (d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both. Pub. L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 216. The Electronic Communications Privacy Act of 1986, Pub. L. 99-508 (effective January 20, 1987), comprehensively revised Title III but preserved section 2515 without amendment.

[2]"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Plaintiff argues that the only conceivable justification for the Act is the Commerce Clause of the Constitution. Art. 1, § 8, cl.3. Plaintiff recognizes that the United States Supreme Court has affirmed the wide scope of the Commerce Clause even as applied to the states, but relies on language in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), that can be construed as having left open the possibility that the Tenth Amendment might impose some "affirmative limits . . . on federal action affecting the States under the Commerce Clause." Id. at 556. Plaintiff contends that the Act exceeds such affirmative limits.

The complaint mainly addresses legal questions, not facts. Its statement of the facts of the underlying "controversy" is limited to the following:

> Plaintiff is in receipt of a recording of telephone conversations containing evidence of public corruption. The recording was delivered anonymously, and recorded by a person or persons

> unknown. 18 USC 2511 and 2515 are preventing investigation of these apparent acts of public corruption.

The "recording" is an audio cassette tape recording that has been the subject of considerable dispute in civil matters on the Court's docket. Jo-Dan, Ltd., Inc. v. Detroit Board of Education, No. 86-CV-72565-DT; A & M Corp. v. Landmark Shoppe, Inc., No. 86-CV-72738-DT; Asmar v. Detroit News, Inc., No. 86-CV-73390.

Plaintiff did not allege that a prosecution is advancing in which a state prosecutor will attempt to introduce as evidence the recording or evidence derived therefore. The complaint did allege that the United States Supreme Court had previously declined to assert original jurisdiction over the matter.[3]

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[3]Plaintiff apparently sought to invoke the Supreme Court's original, but not exclusive, jurisdiction over controversies between the United States and a State. See 28 U.S.C. § (Footnote Continued)

Concerned that the case was not "ripe" for judicial consideration, the Court issued an Order to Show Cause on March 13, 1987, giving both parties an opportunity to comment on whether a "case or controversy" exists, as required by Art. III, § 2, cl. 1 of the Constitution. The Order noted that plaintiff appeared to be seeking "an advisory decree upon a hypothetical state of facts." Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 325 (1936), cited in Advisory Committee Notes to Rule 57, supra. The Order also noted that a federal court will not declare on the constitutionality of aspects of an investigation

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(Footnote Continued)
1251(b)(2). The complaint states that the Supreme Court declined leave to plaintiff to file a bill of complaint in this matter and that the Solicitor General opposed plaintiff's application on the ground that the federal district is a more appropriate original forum. The Supreme Court's one sentence order expressed no opinion as to the appropriate forum in this matter. State of Michigan v. Meese, 107 S.Ct. 1274 (1987).

in progress. See Hastings v. Judicial Conference of the United States, 770 F.2d 1093, 1100-03 (D.C. Cir. 1985). Finally, the Order stated that it does not appear that "all parties having an interest [in the declaration sought] or adversely affected [have been] made parties or be[en] cited." Advisory Notes, supra.

Plaintiff's response to the Order to Show Cause revealed that the Wayne County Citizens Grand Jury issued subpoenas in an investigation related to matters disclosed on the tape recording of various telephone conversations, including officials of the Detroit Board of Education, intercepted in probable violation of 18 U.S.C. § 2515. Following a motion in Wayne County Circuit Court to quash the subpoenas based on the Act, a Wayne County circuit judge supervising the grand jury quashed the subpoenas on June 18, 1986, citing the Act as the basis for his decision. Plaintiff filed the state court order quashing

the subpoenas and a transcript of the extensive hearing on the motion. Plaintiff argued that the state judge's action created a "case or controversy" because it deprived the State of the only means of investigating the matters discussed in the conversations on the tape.

Defendant filed a response to the Order to Show Cause on April 13, 1987. Defendant, who is joined in the case because he is "charged with the responsibility of enforcing the laws of the United states,"[4] agreed with plaintiff that the matter is ripe for judicial consideration. Defendant asserted that purely legal questions are involved and unlikely to be clarified by further factual development. See Thomas v. Union Carbide Agricultural Productions Co., 473 U.S. 568, 581 (1985); Babbitt

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[4]The Attorney General is a proper party to any action affecting the interests of the United States. See 28 U.S.C. §§ 516, 517, 2403(a); see also Fed. R.Civ. P. 24(c).

v. United Farm Workers National Union, 442 U.S. 289, 300-01 (1979).

For the reasons stated on the record of the hearing on May 4, 1987, the Order to Show Cause was dismissed by Order of May 5. On May 22, the intervening defendants - one of whom admits involvement in the intercepted conversations - moved to intervene either as of right, Fed. R. Civ. p. 24(a)(2), or by permission, Fed. R. Civ. P. 24(b)(2). The motion was granted on June.

Now before the Court are cross-motions for summary judgment. Fed. R. Civ. P. 56. There are no disputes over facts, as the case presents a purely legal question. The parties have ably briefed the issue, and the Court has conducted its own analysis beyond the scope of the briefs.

For the reasons that follow, defendant's Motion is GRANTED and the case is DISMISSED.

II.

A.

This case clearly poses a question about the limits of the principle of federalism and its embodiment in the Bill of Rights, the Tenth Amendment. Much has been said of late about federalism and the role of the judiciary. Compare, e.g., The Status of Federalism in America (Reporting of the Working Group on Federalism of the Domestic Policy Council, Nov., 1986) (bemoaning the failure of the Supreme Court to overrule more Congressional statutes), and Van Alstyne, The Second Death of Federalism, 83 Mich. L. Rev. 1709 (1985) (criticizing Garcia, supra), with J. Choper, Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court (1980) (proposing that the Supreme Court rule such federalism issues to be nonjusticiable questions that must be left to the political branches).

At least two state courts have noted that section 2515 involves questions of federalism

when applied to state court proceedings that are traditionally of state concern. Compare In re Marriage of Lopp, 378 N.E.2d 414, 421 (Ind. 1978) (refusing to apply section 2515 under circumstances of case), cert. denied, 439 U.S. 1116 (1979), with Halpin v. Superior Court of San Bernardino County, 495 P.2d 1295, 1305 (Cal.) (rejecting Tenth Amendment challenge to section 2515), cert. denied, 409 U.S. 982 (1972). One constitutional scholar has noted that, in general, the "[e]xpansion of federal criminal jurisdiction raises some of the most sensitive problems of potential congressional impingement upon the values of federalism." G. Gunther, Constitutional Law Cases and Materials 194 (9th ed. 1978).

B.

However divergent may be the political, academic, and state court views regarding federalism, the Court is bound to look for guidance in the decisions of the Supreme Court of the United States. The issue is not decided

in a legal vacuum. The Supreme Court has considered the scope of the Tenth Amendment, even though its teachings on that subject may be in a state of flux. Briefly, however, this much can be said: there is not a single case that can be considered "good law" that purports to overrule a federal statute on the ground that it violates the Tenth Amendment.

In Usery v. National League of Cities, 326 U.S. 833 (1976), the Supreme Court struck down a federal minimum wage statute for state employees as violative of the Tenth Amendment. After Usery, however, the Supreme Court declined to invalidate a single federal law applicable to the states on the ground that it interferes with their autonomy under the Tenth Amendment. Now, even Usery is no longer the law. With the Supreme Court's decision in Garcia, supra, which overruled Usery, the Tenth Amendment has become a dead letter in constitutional law.

Subsequent to Garcia, it is not clear what standard applies to issues like the one before the Court. Garcia seems to have discarded Usery's "balancing" test. See 469 U.S. at 564 n.7 (Powell, J., dissenting). But see id. at 579-80 (Rehnquist, J., dissenting) (disagreeing that Usery announced a "balancing" test). However, Garcia fails to "identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause." Id. at 556. Indeed, the State of Michigan admits that "it is difficult to conceive a method of analysis for the question here at issue." While the State has attempted to fill this void with some imaginative legal and political analysis, it does not lead to the declaration it seeks.

C.

The Supreme Court is unlikely to accept the State's argument here, since the Supreme Court has applied the exclusionary rule - a judicial supervisory rule not required by the

Constitution, see United States v. Leon, 468 U.S. 897, 905-06 (1984) - to the States, with the same result as here of suppressing evidence the State seeks to introduce in a prosecution. Under the exclusionary rule, states ar bound to exclude evidence in some cases even where governmental agents obtained the evidence in subjective good faith (as, for example, where an officer's seizure of the evidence under a facially deficient warrant is not objectively reasonable). Leon, 468 U. S. at 922-23. The Supreme Court has already noted that, as the exclusionary rule was understood at the time, section 2515 proscribes such evidence not only to deter misconduct by governmental agents but also to preserve the integrity of court proceedings, i.e., "to ensure that the courts do not become partners to illegal conduct." Gelbard v. U.S., 408 U.S. 41, 49-51 & n.8 (1972) (quoting the Congressional findings that precede Title III, § 801 (b), 82 Stat. 211). Thus, the State's

argument here that its agents did nothing reprehensible in obtaining the recording at issue is not relevant.

Another persuasive example against the State's position is the Supreme Court's requirement that state courts exclude confessions obtained in violation of the familiar Miranda warning (or an adequate state equivalent). Here, the Supreme Court has imposed on state criminal proceedings a judicially-designed rule of evidence not required by the Constitution. See Michigan v. Tucker, 417 U.S. 433, 444 (1974). The result is to exclude in some cases evidence voluntarily given and constitutionally obtained. See Michigan v. Mosely, 423 U.S. 96, 100 (1975); Tucker, supra, 417 U.S. at 443.

By enacting section 2515, Congress requires exclusion of illegally obtained electronic recordings, which is a form of obtaining an incriminating statement without informed consent or proper safeguards against intrusion

of privacy. The State does not say why, if it is legitimate for the Supreme Court to promote the integrity of the courts through rules of criminal procedure, Congress may not do the same. In Olmstead v. United States, 277 U.S. 438 (1927), the Supreme Court endorsed the power of Congress to make intercepted telephone conversations inadmissible whereas the courts might lack such power under the Fourth Amendment (as understood at that time). Id. at 465-66. Indeed, the legislative history of section 2515 indicates that Congress largely intended to reflect existing search and seizure law. See S.Rep. No. 1097, 90th Cong. 2d Sess. 66, 96, reprinted in 1968 U.S. Code Cong. & Admin. News 2112, 2185.

The State concedes that Congress may forbid private persons from intercepting conversations without authorization, but simply argues that the State may subsequently use evidence privately intercepted even if its own agents could not have legally made the initial

seizure. While the Supreme Court has accepted this argument where Congress has not spoken, see United States v. Jacobsen, 466 U.S. 109 (1984), the Supreme Court has disallowed state use of such evidence where Congress has spoken, as in section 605 of the Communications Act of 1934, the predecessor of section 2515. See Lee v. Florida, 392 U.S. 3789 (1968).[5] The State correctly points out that the Supreme Court in Lee did not address the Tenth Amendment issue. Nonetheless, the Supreme Court's subsequent pronouncements on the Tenth Amendment and continued application of the exclusionary rule to state courts

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[5]The Court in Lee stated: "We conclude . . . that nothing short of mandatory exclusion of the illegal evidence will compel respect for the federal law 'in the only effectively available way - by removing the incentive to disregard it.' Elkins v. United States, 364 U.S. 206, 317 (1960)." 392 U.S. at 386-87. The Court of Appeals for the First Circuit recently reached the same conclusion under the current section 2515. United States v. Vest, 813 F.2d 477 (1st Cir. 1987).

suggest it would not overrule Lee or the statutory basis for that decision.

In enacting section 2515, Congress noted, "Only by striking at all aspects of the problem can privacy be adequately protect." S. Rep. No. 1097, supra, at 69 (quoted in Gelbard, supra, 408 U.S. at 50), reprinted in 1968 U.S. Code Cong. & Admin. News 2156. In making this statement, Congress indicated that it considers judicial exclusion of improperly obtained communications "necessary and proper" to execute its other intentions in Title III. See S. Rep. No. 1097, supra, at 96, reprinted in 1968 U.S. Code Cong. & Admin. News 2185 (asserting power found at Art. 1, § 8, cl. 18). As noted above, these other intentions include judicial integrity, which, as also noted earlier, was dispositive in the Supreme Court's decision in Lee to uphold the predecessor statute to section 2515. In short, Congress agrees with the Supreme Court that a bright-line rule of exclusion is best suited to protect

the federal the federal interests at stake. Such bright-line rules are always best addressed in the political arena rather than in the courts, since they evolve against the background of law developed on an ad hoc basis by the courts. See Professor Herbert Wechsler's seminal work on this subject, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Reve. 543, 545 (1954).

Where, as here, the State concedes Congress's power (absent consideration of the Tenth Amendment) to enact such a law, the Tenth Amendment does not impose an independent limitation on Congress that permits a court to reject Congress's view that a narrow aspect of a statute is "necessary" to

effectively implement its larger purposes.[6] As

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[6]Porfessor Van Alstyne has noted the Supreme Court's general refusal to substitute its view of what is "necessary" for that of Congress when federalism concerns are involved. "Usually, . . . even in close cases when the federalism claims has failed (as most often it has indeed failed), it has failed because the Court has yielded to an assertion of some overriding federal interest it deemed adequate to rationalize the exceptional intrusiveness of the challenged act." The Second Death of Federalism, supra, 83 Mich. L. Rev. at 1722 & n.61. See Fry v. United States, 421 U.S. 542, 548 (1975) (upholding application of federal wage restraints as a national emergency measure); Testa v. Katt, 330 U.S. 386 (1947) (upholding binding nature of penal provisions of Emergency Price Control Act on state courts under supremacy clause); Case v. Bowles, 327 U.S. 92 (1946) (upholding application of the Emergency Price Control Act against Tenth Amendment challenge).

While not explicitly considering the Tenth Amendment issue, the Courth as several times struck state judicial procedural rules in order to further a federal legislative goal or protect a federal statutory right. See International Longshoreman's Ass'n, AFL-CIO v. Davis, 106 S.Ct. 1904 (1986) (striking state pleading rule to protect preemption of National Labor Relations Act); Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359 (1952) (striking state procedural rule to protect right of recovery under Federal Employes' Liability Act); Brown v. Western Ry. of Alabama, 338 U.S. 294 (1949) (same); see also Chapman v.

(Footnote Continued)

stated by Justice Story: "It is plain, therefore, that it could not have been the intention of the framers of this [Tenth] amendment to give it effect, as an abridgement of any of the powers granted under the constitution, whether they are express or implied, direct or incidental." 3 Commentaries on the Constitution § 1901 (1833), in V The Founders' Constitution, 406 (P. Kurland & R. Lerner ed. 1987).

There is nothing peculiar about Congress's intrusion under the Commerce Clause into state criminal proceedings that compels a different conclusion. Admittedly, there is little discussion by the Founding Fathers of the meaning of the Tenth Amendment as it relates to criminal laws and their administration. This is to be expected, since it was

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(Footnote Continued)
California, 386 U.S. 18 (1967) (imposing federal interpretation of "harmless error rule" over that of state).

presumed that all powers in such matters not given to the United States would continue, unenumerated, within the states as before. However, there is a pertinent reference by President James Monroe on this subject: "[T]he administration of justice, and the whole criminal code, except in cases of breaches of the laws of the United States made under and in conformity with the powers vested in Congress . . . are regulated by State laws." The Founders' Constitution, supra, at 405., reprinting in part Views of the President of the United States on the Subject of Internal Improvements (May 4, 1822) (emphasis added). This statement evidences that one of the few Founding Fathers[7] who may have said anything

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[7]While some may disagree with the characterization of Monroe as a "Founding Father," he participated substantially in the formation of the Republic, including the debates about the principle of federalism, and was familiar with the thinking of the greater

(Footnote Continued)

on the subject did not consider the Tenth Amendment to establish any special limitation on Congress simply because it may choose to exercise its vested power in the criminal arena.

Currently, constitutional doctrine regarding the Tenth Amendment has reverted to its pre-Usery state, to wit, the Tenth Amendment is no more than a truism; it tautologically states that powers not given to the federal government are reserved to the states. The Court recognizes the avowed intent of Chief Justice Rehnquist in his Garcia dissent to resurrect Usery. 469 U.S. at 580. Perhaps a majority of the Supreme Court will do so as its

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(Footnote Continued)
men who overshadowed him during that era. Monroe studied law under Thomas Jefferson beginning in 1780. From 1783 to 1786 he served in the Congress under the Articles of Confederation. He was chosen a member of the Virginia House of Delegates in 1787 and, in 1788, a member of the state convention at which Virginia ratified the new federal Constitution.

composition changes and shifts in its politics and philosophy of constitutional adjudication.

As noted by Professor Herbert Wechsler, "Federalism would have few adherents were it not, like other elements of government, a means and not an end." The Political Safeguards of Federalism, supra, at 552. A return to Usery would likely be considered to "politicize" the Constitution, which the defendant has cautioned against elsewhere.[8] The

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[8]See Remarks of the Attorney General at the American Studies Center Bicentennial Program in Washington, D.C. (June 12, 1987). The printed version of the Attorney General's address states at 2: "Too often the Constitution has been, in a word, politicized. The modern-day politicization of our supreme law has been encouraged primarily by political and judicial liberals . . ." Commentators have noted, however, that Usery was a conservative politcal doctrine. A leading treatise on constitutional law describes the rise of Usery as follows: "There is little or no explanation for the shift in the Court's position regarding the judicially enforceable nature of the tenth amendment other than the political background and philosophy of the newly appointed justices. The decisions of the 1970's,

(Footnote Continued)

long-standing view, however, has been that the Tenth Amendment will not support political goals:

> The attempts, then, which have been made from time to time, to force upon this language [the Tenth Amendment] an abridging, or restrictive influence, are utterly unfounded in any just rules of interpreting the words, or the sense of the instrument. Stripped of the ingenious disguises, in which they are clothed, they are neither more nor less, than attempts to foist into the test the word "expressly;" to qualify, what is general, and obscure, what is clear, and defined. They make the sense of the passage bend to the wishes and prejudices of the interpreter; and employ criticism to support a theory, and not to guide it. . . . [Constitutions] are not to

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(Footnote Continued)
attacking the established principle of judicial deference to congressional decisions regarding federalism issues were joined only by Republican justices. Those justices were Blackmun, Powell, Rehnquist, Stewart (who was replaced by the even more states' rights oriented Justice O'Connor) and Chief Justice Burger." J. Nowak, R. Rotunda & J. Young, Constitutional Law 162 n.33 (ed ed. 1986). Ultimately, the doctrinal "glue" holding together the Usery approach proved so weak that it could not hold even a majority of a conservative Court, as reflected in the change of mind by Justice Blackmun, who concurred in Usery but wrote the opinion of the Court in Garcia only nine years later.

> be frittered away to please the demagogues of the day. They are not to be violated to gratify the ambition of political leaders.

Story, Commentaries, supra, §1901, in V The Founders' Constitution, supra, at 407.

III.

Even if the Garcia dictum on which the State relies makes the Tenth Amendment fertile soil for planting the seeds of a states' rights movement, it would ill behoove a federal district judge to say so by declaring unconstitutional an act of Congress in so important an area as here. Much has been said of late regarding the evils of activist judges who strain to overrule legislation enacted by the elected representatives of the people. If those elected to serve in Washington should desire to constrain the actions of their governments back home, far be it from this Court to tell them that they cannot do so. See Garcia, 469 U.S. at 556. See generally The Political Safeguards of Federalism, supra.

If the Constitution forbids the Act, it is for someone else to say.

SO ORDERED.

AVERN COHN
United States District Judges

Dated: August 10, 1987
Detroit, Michigan

APPENDIX B

NOT FOR PUBLICATION

No. 87-1719

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v.

EDWIN MEESE, Attorney General for the United States,

Defendant-Appellee,

and

STEVE ASMAR & METRO INSTITUTIONAL FOOD SERVICES, INC.,

Intervening Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

BEFORE: JONES and RYAN, Circuit Judges; and GIBSON, District Judge.*

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*The Honorable Benjamin F. Gibson, United States District Judge for the Western District of Michigan, sitting by designation.

PER CURIAM. The State of Michigan, brought this declaratory judgment action asking the district court to find that 18 U.S.C. § 2515, which excludes from evidence in all state criminal and civil trial, conversations which were recorded in violation of the federal wiretapping statutes, is beyond the scope of Congress' Commerce Clause power and therefore violative of the tenth amendment. The district court dismissed plaintiff's action. We affirm.

A Wayne County, Michigan grand jury issued subpoenas based on privately tape recorded telephone conversations anonymously given to state prosecutors. A Michigan state court quashed the subpoenas, holding that the evidence was obtained in violation of Title 111 of the Omnibus Crime Control Act and Safe Streets Act of 1968, 18 U.S.C. § 2515. The state court's action ended the grand jury investigation.

On March 10, 1987, the State of Michigan filed suit in federal district court against the Attorney General of the United States, seeking a declaratory judgment that 18 U.S.C. § 2515 was violative of the tenth amendment. Section 2515 states:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. § 2515.

The State of Michigan argued that § 2515 required the suppression of evidence where the state was not a party because of § 2511 which states in pertinent part:

> (1) Except as otherwise specifically provided in this chapter any person who--
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> > (a) intentionally intercepts, endeavors to intercept, or procures any

other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when--

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

. . .

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

18 U.S.C. § 2511. Plaintiff argued that requiring suppression of the evidence was beyond the Congress' Commerce Clause power, under which the Crime Control Act was passed.

The district court issued a show cause order as to ripeness. The parties agreed there was a case or controversy within article 111 of the Constitution. Thereafter, on cross-motions for summary judgment, the district court found that the exclusionary rule found in 18 U.S.C. § 2515 was constitutional as an exercise of Congress' Commerce Clause power.

Although both parties agreed below that this case was ripe for adjudication, the United States Attorney General now argues that there is no "case or controversy" pursuant to article 111 of the Constitution and, therefore, this court lacks subject matter jurisdiction. The judicial power of the federal government is limited to that provided for by article 111.

> Article 111 of the Constitution limits the "judicial power" of the United States to the resolution of "cases" and "controversies." The constitutional power of federal courts cannot be defined, and indeed has no substance, without reference to the necessity "to adjudge the legal rights of litigants in actual controversies." Liverpool S. S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39 (1885). The requirements of Art 111 are not satisfied merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process. The judicial power of the United States defined by Art III is not an unconditioned authority to determine the constitutionality of legislative or executive acts. The power to declare the rights of individuals and to measure the authority of governments, this Court said 90 years ago, "is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy." Chicago & Grand Trunk R. Co. v. Wellman, 143 U.S. 339, 345 (1892).

Valley Forge Christian College v. Americans United for Separation of Church and State 454 U.S. 464, 471 (1982). If there is no case or controversy, this court lacks subject matter jurisdiction to hear this appeal even though the parties agreed below that the case

was right for adjudication; agreement of the parties cannot establish subject matter jurisdiction. In re Rini, 782 F.2d 603, 609 .10 (6th Cir. 1986).

The Supreme Court, discussing the limits of article III power, has stated:

> [A]t an irreducible minimum, Art 111 requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38, 41 (1976).

Valley Forge Christian College, 454 U.S. at 472. Thus, the plaintiff, in the instant case, must show that (1) it has suffered actual or threatened injury, which it clearly has through the quashing of the subpoenas, and (2) the injury was the result of an act of the defendant. "The court may not act to redress injury 'that results from the independent action of some third party not before the

court.'" Toth v. United Auto. Aero. & Agr. Implement Workers, 743 F.2d 398, 404 (6th Cir. 1984) (quoting Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 42 (1976)). It is the second element which the plaintiff fails to satisfy.

Plaintiff's injury did not result from any action taken by the defendant, the Attorney General of the United States. Rather, it was the state trial court judge who quashed the subpoenas and enforced the federal statute, 18 U.S.C. § 2515. The Attorney General has not threatened plaintiff with any penalty for attempting to use the taped conversations which are the subject of this litigation. Plaintiff's remedy is to appeal the state court's decision through the state court system.

Because defendant herein has not caused the injury suffered by the plaintiff, this court is without subject matter jurisdiction to hear this appeal. Although the district court dismissed the instant action on the merits, this

court may affirm the district court for reasons other than those stated by the lower court. Russ' Kwik Car Wash v. Marathon Petroleum Co., 772 F.2d 214, 216 (6th Cir. 1985).

For the reasons stated above the decision of the district court is AFFIRMED.

ISSUED AS MANDATE: July 28, 1988

COSTS: NONE